IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.576 OF 1990

Shri Dharmarao Sidhappa Shetgar)
since deceased through LRs)
1a. Smt. Padmanabai Dharmarao Shetgar)
1b. Kesharbai Shamrao Shetgar)
1c. Sidhappa Dharmarao Shetgar)
1d. Dhananjay Dharmarao Shetgar)
1e. Kum.Tanuja Dharmarao Shetgar)
All R/o Naldurg, Tal. Tulzapur.)
Dist. Solapur.)...Appellants

Versus

1. Shri Gopal Shriniwas Shirsikar)
Aged about 60 years, occ.Business)
residing at 1020 Murarji Peth,)
Solapur.)

2. Hirachand Anandrao Jamalapure) Abated
aged about 67 years, Occupation) vide Court's
pensioner, residing at House) Order dated
No.395, West Mangalwar Peth.) 17.3.2004
Solapur.)

3. Sou. Yamunabai Gopalrao Shirsikar)
aged about 50 years, Occupation)
Household work, residing at House)
No.1020, Murarji Peth, Solapur.)

4. Shri Vijaykumar Gopalrao Shirsikar)
aged about 40 years, Occupation)
Medical Officer, residing at)
1020 Murarji Peth, Solapur.)

5. Shri Dilipkumar Gopalrao shirsikar)
aged about 34 years, Occupation)
Service, residing at as above)

6. Shri Pradipkumar Gopalrao Shirsikar)
aged 32 years, Occupation service)
residing at as above.)...Respondents

Mr.V.B.Rajure for the appellants
Mr.S.B.Deshpande for respondent Nos.1 to 3 and 6

Mr.Padmakant M. Shah for respondent No. 3 to 6

CORAM : P.V.KAKADE, J.

DATE : 14TH OCTOBER, 2005.

ORAL JUDGMENT :

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Solapur dated 30th November, 1989 partly allowing the Appeal but concurring with the findings of the learned trial court that specific performance of the contract cannot be granted in favour of the Plaintiff. This finding came to be recorded in the appeal against the Order passed by Joint Civil Judge, Junior Division, Solapur dated 25th November, 1986 dismissing the plaintiff's suit for specific performance but granting refund of earnest money at the foot of the suit transaction.

2. I have heard the learned counsel for both the parties. Perused the entire record including the written submissions filed by both the sides.

3. The plaintiff came with the suit for specific

performance of the agreement with the defendant no.1 with allegations that the suit property was owned and possessed by defendant no.1 as it had been allotted to his share. It was alleged that the defendant no.1 is a Karta of the joint family and intended to sell the suit house. It is the case of the plaintiff that he approached the defendant and they settled the transaction of the suit house for Rs.15,000/= and accordingly on 25.9.1978 they entered into an agreement of sale and at that time defendant no.1 was paid Rs.9000/= as earnest money. It is alleged that the terms and conditions of the agreement were that it was for the defendant no.1 to obtain necessary permission at his costs and after obtaining the same and informing the plaintiff in writing he should execute the sale deed within two months therefrom. It was also alleged that till the execution of the sale deed defendant no.1 was to pay the taxes. The expenses towards the execution of sale deed was to be incurred by the plaintiff. It is further case that on 25.9.1978 the plaintiff was put in possession of the first floor as part performance of the agreement and in case if defendants failed to execute the sale deed the plaintiff should get the same through court. It is the case of the plaintiff that he was

ready and will to perform his part of the contract, the defendant no.1 has committed breach. The plaintiff further alleged that he intimated the defendant no.1 to obtain necessary permission but no steps were taken. It is also the case that amount of Rs.860.40 ps. had been recovered from the plaintiff as the tax amount and therefore, according to the plaintiff, the said amount is liable to be adjusted and deducted from the earnest money and suit transaction amount. It was further submitted that even though the defendant no.1 was informed to remain present and to execute the sale deed, however, he had refused to execute the sale deed and hence the suit came to be filed. It is contended that defendant no.1 had filed R.C.S.No.944 of 1975 for possession against the defendant no.2 therefore, defendant no.2 had been added as party to the proceeding. It is further alleged that the suit transaction is binding on defendant nos.3 to 6, as the members of the joint family and they have also got the benefit of the suit transaction. On this ground the plaintiff has filed the suit seeking decree for possession of specific performance of the suit property. In the alternative he prayed for refund of earnest money.

. The Defendant no.1 appeared and contested the suit, inter alia, denying the allegations made by the plaintiff. It was contended that it was not correct that the suit transaction was for the benefit of the family. He had admitted that agreement of sale had been entered by him but that transaction is not in capacity of Karta of family. According to him, time of essence of the contract, however, purposely plaintiff suppressed this fact. According to the defendant no.1, the plaintiff was not ready and willing to perform his part of the contract. It was also alleged that he was never called upon to remain present in the Sub-Registrar's Office for the execution of the sale deed. The defendant No.1 has further come with the case that he was ready and willing to perform his part of the contract within stipulated time, however, the plaintiff was not ready and as such the specific performance cannot be granted. It is further contended that on 22.11.1978 he obtained the permission from the competent authority to execute the sale deed but inspite of that the plaintiff was not ready to get the sale deed executed within two months as stipulated, therefore, according to him, the plaintiff is not entitled to

specific performance and the suit was sought to be dismissed.

. The defendant Nos.3 and 6 appeared and filed their written statement submitting that the defendant no.1 had no legal authority to enter into the transaction as Karta of the family, said to be for the benefit of the family. According to them, they had no knowledge of the transaction and they would never have consented to the same. It is their case that there is no privity of contract between the plaintiff and defendant nos.3 to 6 and as such agreement is not binding upon them. On such and other grounds the suit was sought to be dismissed. The defendant no.2, one of the stranger occupant of the property filed his written statement supporting to plaintiff.

4. On the basis of these pleadings, the learned Trial Judge proceeded to adjudicate the dispute. He came to the conclusion that the plaintiff had proved that the defendant no.1 being Karta of the joint family agreed to sale out the suit property to the plaintiff for a consideration of Rs.15,000/=, but it was also held that transaction was not for legal necessity. It was

further held that the plaintiff had proved that the amount of Rs.9000/= was paid to the defendant no.1 at the foot of the transaction. It was held that the plaintiff had failed to prove that he was ready and willing to perform his part of the contract, on the other hand, it was held that the defendant no.1 had proved that the sale permission was granted to him on 22.11.1978 and still the plaintiff failed to execute the sale deed within two months from the date of such permission, though the time was essence to the contract. Therefore, the suit for specific performance came to be dismissed, however, the alternative prayer for refund of earnest money was granted.

5. The appeal was carried to the District Court, Solapur. The learned Addl. District Judge heard both the parties and came to the conclusion that the Plaintiff had proved that he was ready and willing to perform his part of the contract but he had failed to prove that the suit transaction took place between the defendant no.1 and himself for legal necessity and on such and other grounds it was held that the plaintiff was not entitled to specific performance of the contract against the defendants and appeal came to be partly

allowed with direction that the suit for specific performance was dismissed. Order passed by the trial court to earnest money was confirmed on finding to the effect that the appellant-plaintiff is also entitled to interest on the earnest money at the rate of 6% p.a. and as such the appeal was disposed of. Hence the present appeal.

6. It may be noted that at the stage of admission of this appeal, the admission Judge directed that the appeal deserve to be admitted on the basis of the grounds No.3, 4, 5 and 11 as contained in the appeal memo. Those are to the effect whether the discretion exercised by the courts below in refusing specific performance is according to the judicial principles. Further the question was also raised to the effect whether the plaintiff was ready and willing to perform his part of the contract?

7. At the outset, it must be noted that though the trial court has recorded findings to the effect that the plaintiff had failed to prove that he was ready and willing to perform his part of the contract. The appellate court has reversed that findings and held that

the evidence on record is sufficient to show that the plaintiff was ready and willing to perform his contract. There is no cross appeal filed against the findings recorded by the lower appellate court on this issue, and therefore, it was submitted that the findings in this regard has attained finality. Under such circumstances, it was submitted that once the lower appellate court had come to the conclusion that the plaintiff had proved that he was ready and willing to perform his part of the contract then it was not justifiable on the part of the lower appellate court to refuse the specific performance. However, in this regard it must be noted that perusal of the judgments of both the courts below, and the findings in this regard recorded by the lower appellate court, it is to be noted that the specific performance is denied on legal and valid grounds.

. Mr.Rajure, the learned counsel for the appellants sought to put reliance on the ruling of the Apex Court in the case of **Prakash Chandra vs. Angadlal and Ors. reported in AIR 1979 SC 1241**. The ratio of which is to the effect that in the suit for specific performance the ordinary rule is that specific performance is to be granted. It ought to be denied

only when equitable considerations point to its refusal and the circumstances shows that damages would constitute an adequate relief. I have perused the facts involved in the said case, which was before the Apex Court, and must note that so far as ratio laid down by the said ruling is concerned there cannot be two opinions, however, that cannot be made applicable in the present case, especially in view of the facts and circumstances involved herein. It is pertinent to note that both the courts below have concurrently come to the conclusion that there is absolutely no evidence on record to show that there was any legal necessity to sale the property. Evidently, it is not denied that defendant no.1 is Karta of family and as such sale transaction was in capacity as Karta. Therefore, it was necessary for the plaintiff to show that there was legal necessity existing to sale the property and the transaction was for benefit of the entire family. In this task the plaintiff has totally failed to establish that the transaction was either for benefit of the family or for legal necessity. In fact the evidence on record is indicative of opposite position as can be seen from the stand taken by the Respondents-Defendant nos.3 to 6. It is proved in evidence that though the family

members of defendant no.1 were earning members and there was absolutely no necessity for defendant no.1 to sale the property for benefit of family. Once it is established that there was no legal necessity to sale the suit property, then the entire scenario has to be appreciated from that angle. The learned lower appellate court judge has held that taking into consideration the suit transaction, the defendant nos.3 to 6 have undivided joint share in the suit property and they are not ready to perform the contract of selling their share to the plaintiff and the plaintiff has not yet paid the entire amount of the sale transaction to the defendant no.1. Moreover, defendant also refused to perform the contract on his behalf. Under such circumstances it was held that the plaintiff will not be entitled for specific performance of the contract from the defendants especially on categorical refusal in that regard on behalf of the defendant nos.3 to 6. In other words, it is one of those cases wherein specific performance of the contract is a legal impossibility and as such cannot be enforced by law. Therefore, taking into account these aspects, it must be held that equity demands that specific performance of the contract has to be refused to the plaintiff, in view of interest of the

entire family of defendant no.1. Therefore, the findings recorded by the lower appellate court judge in this regard appears to be legal and proper and are on the basis of available evidence on record and therefore, it would brook no interference.

8. So far as alternative relief is concerned, the lower appellate court judge has rightly granted decree for recovery of amount of Rs.9860.40 from the respondent no.1 which he had received and the Municipal taxes paid by the appellant in respect of the suit house. However, the appellant is held entitled to interest on the earnest money of Rs.9000/= from the respondent no.1 at the rate of 6% p.a. from the date of the suit i.e. 15.2.1980 till realisation of the said amount. The lower appellate court also held that the appellant is entitled for costs of the appeal. In my considered view, the lower appellate court has looked into and has given proper consideration to all the equities available to the appellant and therefore, I am inclined to interfere with the said order.

9. In the result the appeal stands dismissed with no order as to costs.